IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. .....

RUTH COHEN, PERSONALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF BENJAMIN E. COHEN, DECEASED, JEAN COHEN, BETTY COHEN AND CHARLES JAMES COHEN,

Respondents,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was filed January 21, 1944, is reported in 140 Fed. (2nd) 1, and appears in the record at page 250.

The findings of fact and conclusions of law in the District Court appear in the Record at pages 213-218. The decree of the District Court appears in the Record at pages 219-220. The opinion of the District Court appears in the Record at page 212.

Jurisdiction.

(Note Petition, *supra.*)

Statement of the Case.

The facts are not in dispute. Substantially all of the facts material to the consideration by this Court of the questions presented are succinctly set forth in the opinion of the Circuit Court of Appeals, as follows:

> "Following uncompleted prior contractual negotiations between the parties, defendant's Chicago counsel presented to plaintiff an unsigned written contract which plaintiff promptly executed and left with the attorneys to be forwarded to defendant in Boston. On May 26, 1942 defendant returned the agreement fully executed to its Chicago lawyers, who immediately advised plaintiff by telephone of the completed execution and of its intention to deposit the original immediately with the escrow agent and to send a copy to plaintiff.
>
> "The agreement provided that defendant would sell and plaintiff would buy the property subject to certain leases, special assessments, taxes and possible easements, for the sum of $85,000, and that the vendor would furnish a guaranty policy as to the title. Payments were to be made in installments and, in the interim, the instrument was to be held in escrow by Hall & Ellis for the mutual benefit of the parties.
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> "After telephoning plaintiff, defendant's attorneys prepared three letters: one to plaintiff, saying that the contract had been delivered to the escrow agent; one to the escrow agent, enclosing the document, and a third to plaintiff advising it of these facts. After the letter to plaintiff had been mailed but before the letters to the other parties had left the office, defend-

ant's general counsel in Boston called its Chicago attorneys, saying that defendant had decided that it did not desire to make the transfer unless it could be done in such a way as to prevent prejudice to the tenant and that the matter would be held in abeyance until further notice. Thereupon defendant's counsel advised plaintiff by telephone that they had been in error in writing that the contract had been delivered to Hall & Ellis; that it was being held in the office and would be retained until further notice."

Following the refusal of petitioner's attorneys to deliver the document, which is alleged to constitute the contract in question, or to recognize that any binding acceptance had been made by petitioner of the offer, suit was instituted in the State Court for specific performance. Upon application by petitioner, defendant in said suit, the cause was removed to the District Court on the ground of diversity of citizenship.

Pursuant to stipulation, the cause was submitted to the District Court on depositions and briefs, without the taking of any testimony in open court. The Court entered a decree for specific performance in favor of the plaintiff and against petitioner, from which the appeal was taken.

The Circuit Court of Appeals properly held that everything which preceded the signing of the alleged contract in question was immaterial because it merely constituted uncompleted negotiations in an attempt to secure a final agreement. It was further properly held:

"When plaintiff signed the agreement and left it with defendant's attorneys in Chicago to be forwarded to defendant in Boston for execution, he thereby made a written offer to defendant upon the terms specified therein. 'Where both parties sign a written agreement, the first signer necessarily proposes that the

writing shall represent the bargain between the parties.' 1 Williston on Contracts, Revised Edition 1936, Section 23, p. 46.''

The narrow issue is thus presented as to whether petitioner merely by signing the instrument and returning the same to its own attorneys accepted the offer, notwithstanding the fact that the instrument at all times thereafter remained in the possession of petitioner's own attorneys. The Circuit Court of Appeals held in the affirmative. Petitioner contends that such decision violates fundamental principles relating to the law of contracts and to attorney and client relationship that have been settled from time immemorial.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is issued are that the Circuit Court of Appeals for the Seventh Circuit, erred:

1. In holding that the mere signing by petitioner of the instrument containing the alleged agreement in question, and the returning of the same by petitioner to its own attorneys constituted a binding acceptance of plaintiff's offer and thereby created a binding contract.

2. In failing to hold that possession by petitioner's attorneys of the instrument in question was a private act of petitioner and was the same as petitioner's own possession, and that no acceptance of plaintiff's offer could have become effective without relinquishment by such attorneys of possession of said instrument.

3. In holding that petitioner accepted plaintiff's offer and that a binding contract was created between the parties.

Summary of Argument.

1. Possession by petitioner's own attorneys was the same as possession by petitioner itself.

2. The forwarding by petitioner to its own attorneys of the alleged acceptance was a mere private act of petitioner.

3. A bilateral written contract was contemplated and delivery of that document was essential to the creation of a contract.

4. An acceptance must be made at the place and in the manner required by the terms of the offer.

5. There was no delivery of the alleged acceptance of the offer in the case at bar.

6. The letter from petitioner's attorneys to plaintiff could not constitute an acceptance of the offer.

7. The telephone notification by petitioner's attorneys to plaintiff could not constitute an acceptance of the offer.

ARGUMENT.

The Circuit Court of Appeals properly held that the written offer in this case consisted of the proposed real estate contract which had been signed by plaintiff and submitted to petitioner's Chicago attorneys, Pam, Hurd & Reichmann.

Obviously, however, an acceptance of that offer was required in order that the transaction might ripen into a binding contract. The Circuit Court of Appeals held that petitioner accepted the offer merely by "signing the instrument and returning it to the Chicago attorneys to be placed in escrow." The instrument in question is plaintiff's Exhibit 4 (Tr. 112-15).

We submit that the Circuit Court of Appeals inadvertently has thereby established a precedent for the startling proposition that when a party forwards a document to *his own attorneys*, he does so at the peril of having it become a legally binding act as against third parties. This goes to the very root of the fundamental concept of the existence of a confidential relationship between attorney and client. We believe that this holding of the Court was due to the fact that the question of whether delivery was required to be made to the escrowee, Hall & Ellis, apparently diverted the attention of the Court from the real issue in this case. The two questions (1) whether delivery to Hall & Ellis was essential to a valid acceptance, and (2) whether *relinquishment of possession and control* by Pam, Hurd & Reichmann was required, are entirely separate and distinct. The holding that delivery to Hall & Ellis was not required, is a far cry from the further holding that relinquishment of possession or control by petitioner's attor-

neys of the signed document was not required. We respectfully submit that the Court has held in effect that because delivery to Hall & Ellis was not required, it follows *a fortiori* that it was not necessary for petitioner to relinquish possession or control of the document in question. As is hereinafter pointed out, even if it be conceded that delivery was not limited to Hall & Ellis, nevertheless a private act of the petitioner without relinquishment of possession or control could not constitute an acceptance. The issue is simply whether the very act of a person in signing and forwarding a document to his own attorneys binds him to a third party. *Carried to its logical conclusion the opinion of the Court as it now stands means that a party cannot sign a document and leave it with his own attorney, because possession by his own attorney is no longer to be regarded as the possession and control of the party himself.* The principle has been settled from time immemorial that possession by one's own attorneys is the same as one's own possession, and that when one delivers a document to his own attorneys, it is precisely the same as if he had locked that document in his own desk drawer. Obviously, an attorney may by agreement be appointed as the agent for all parties to receive possession of a document. However, plaintiff has never contended, and there is not a scintilla of evidence in this case to support any theory that petitioner's attorneys were also to act as plaintiff's agents in receiving possession from petitioner of the document in question. Pam, Hurd & Reichmann never purported to act other than as petitioner's own attorneys in the matter. Assuming, as indeed we must under the opinion of the Court, that delivery to Hall & Ellis, was not a condition precedent to the valid delivery of the document, what then was the point of time that the document could have become effective? *That point of time could only have been when the document was out of the possession and control of petitioner*

regardless of whether petitioner surrendered the same to plaintiff or to plaintiff's agent or elsewhere. In the case at bar, that point of time never in fact was reached, *unless* it be assumed that possession by petitioner's attorneys was in some manner different than possession by petitioner itself. Under no other theory could the document be considered as having gone out of the possession or control of petitioner.

We respectfully urge that the opinion of Court of Appeals stands as a precedent for the proposition that one no longer has the right to have the possession of a document by his own attorneys be deemed and considered to be his own possession.

If a bilateral contract is intended by the parties (as in the case at bar) to be *entirely in writing,* delivery of *that document* which the parties contemplate shall constitute the acceptance is essential to creation of a contract.

Moreover, it is fundamental law that delivery of an acceptance must be made at the *place* and in the *manner* required by the terms of the offer.

As is stated in 12 Am. Jur. p. 537, Section 44:

> "Provisions of the offer as to the place, time or manner or method of acceptance must be complied with."

The classic example of the failure of an offeree to make delivery at the *place* specified in the offer is the leading case of *Eliason* v. *Henshaw,* 4 Wheat. (U. S.) 225, 4 L. Ed. 556. In that case an offer requested an answer by return of wagon to Harpers Ferry. The acceptance was sent to Georgetown and received by the offeror at that place. The Court said:

> "Whatever uncertainty there might have been as to the time when the answer would be received, there was

> none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer. * * * Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing."

The law in Illinois is to the same effect. *Brach* v. *Matteson,* 298 Ill. 387, 391.

Delivery of an acceptance, of course, may be accomplished in a variety of ways. It may be mailed, telegraphed or delivered in person. The particular manner or method of transmission depends entirely upon the express or implied terms of the offer. We emphasize, however, that delivery of an acceptance necessarily involves two distinct questions (1) *what kind of document is to constitute the acceptance, and* (2) *how is that document to be delivered.*

As was said in *Brach* v. *Matteson,* 298 Ill. 387, 392:

> "If the offer requires an acceptance to be made in writing no other form of acceptance can be made. (Page on Contracts, 2d ed.—sec. 191.)"

Questions relating to the manner or method of communicating an acceptance have been before the courts many times. The most troublesome aspect of that question has arisen in cases in which an acceptance is mailed, and the issue is whether the acceptance becomes effective at the

time of mailing or at the time of actual receipt thereof. In such cases, the courts have held that where from the manner of submission of the offer, such as the mailing of the offer to the offeree, it can be inferred that the offeror contemplated that the offer be accepted by mail, the acceptance becomes effective upon the mailing and not the receipt thereof. On the other hand, where the offer is delivered in person to the offeree, the courts have generally held that the acceptance does not become effective upon the mailing but only upon the actual receipt of the same by the offeree. Thus in such case if the offer is revoked by the offeror prior to his actual receipt of the acceptance, or if the offeree withdraws his acceptance before such receipt, no binding contract comes into existence because there has never been acceptance of the offer. These principles are well set forth in *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation* (C.C.A. 6th) 20 Fed. (2d) 67, 69, where the Court said:

> "The rule is invoked that a contract results when an acceptance is placed in the mails, even though it is lost and not delivered; but we do not think this rule applicable to the present situation.
>
> "The rule applies when the offer is made by mail, or when the parties live some distance apart, and it is fairly inferable that the offer contemplated an acceptance by mail. If the proposal has been delivered personally, the rule, as stated in 6 R. C. L. 614, is as follows: 'In such case the proposer is entitled to personal notice that his offer has been accepted, and in the absence of proof of any agreement on his part that such notice might be sent to him by mail, or that such notice so sent has been actually received by him within the time limited, there has been no notice of such acceptance, and unless the acceptance of the offer has been communiciated to the person making it, it is

of no avail.' See *Weaver* v. *Burr.*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94, 103; Williston on Contracts, §§ 81, 83.

"In this case, the writing asserted to be an offer was delivered personally. Nothing appears to indicate an agreement that the reply thereto might be sent by mail. The contrary is inferable from Mr. Cockburn's statement of his purposes and his later presence in Lexington. The acceptance of the approval had to be communicated to or received by the appellee before it could be held there was a meeting of the minds of the parties."

To the same effect is *Estate Stove Co.* v. *W. E. Kenney, et al.*, 234 Ill. App. 366, 369, where an offer was delivered in person and the Court held that delivery of the acceptance, which had been mailed, could not be effective until the actual receipt thereof by the offeror.

A private act of the petitioner, without relinquishing possession or control of the alleged acceptance, of course, could not constitute delivery thereof.

As is stated in 12 Am. Jur., p. 540, Sec. 46:

"Of course, a letter which is written, but remains in the writer's hands or under his control, is not an acceptance. Similarly, where the offeree promptly delivers a letter of acceptance to his agent with directions to mail it, but the agent neglects to mail it within the time specified in the offer, no contract is formed."

An example of this rule is the case of *Maclay* v. *Harvey*, 90 Ill. 525, where the offeree gave an acceptance to a boy to mail and the boy neglected to mail it until the next day.

Again in 12 Am. Jur., p. 535, Sec. 41, it is stated:

> "A mere private act of the person to whom the offer is made does not constitute acceptance."

To the same effect is *Hollingshead* v. *Morris*, 172 Mich. 126, 134; 137 N. W. 527, where an offeree delivered his acceptance to his agent.

Certainly under the above authorities the signing and mailing of the document to petitioner's own attorneys was merely a private act of the petitioner.

Moreover, even if Pam, Hurd & Reichmann had not been petitioner's own attorneys, delivery to them by petitioner of the instrument in question could not in any event constitute an acceptance, for the reason that the office of that law firm was not the place for the delivery of the acceptance specified in the offer. Either the offer specified delivery to Hall & Ellis, as escrowee, or contemplated delivery to plaintiff. We contended that the offer by its very terms required delivery to Hall & Ellis, as escrowee. *In either event*, however, delivery of the acceptance to Pam, Hurd & Reichmann could be no more effective in the case at bar than was delivery of the acceptance at Harpers Ferry in *Eliason* v. *Henshaw*, 4 Wheat. (U.S.) 225, 4 L. Ed. 556.

If the signing by petitioner of the instrument in question, and mailing thereof to its attorney did not constitute an effective act of acceptance, the entire case is then narrowed down to the simple question as to whether or not the notification by Pam, Hurd & Reichmann to plaintiff constituted such an acceptance. We submit that under the authorities and the elementary principles of the law of contracts above set forth, such notification could not constitute an acceptance of plaintiff's offer because *Exhibit 4 never left the possession of Pam, Hurd & Reichmann.*

The letter written and mailed by Pam, Hurd & Reichmann to plaintiff (Plffs. Ex. 14-A, Tr. 118) obviously could not constitute such an acceptance, because (a) the only form of acceptance provided for under the terms of plaintiff's offer was a delivery of *the document itself* as distinguished from a separate letter; (b) such separate letter, even if it could be construed as an attempted acceptance of the offer, was not delivered in the manner or at the place required by the offer; and (c) in any event, the mailing as distinguished from the receipt of the separate letter could not constitute an acceptance.

With respect to (a) the first of these reasons, Exhibit 4 provides that:

> "The words 'date hereof' mean date of *delivery* of this contract. This contract and the earnest money shall be held in escrow by Hall & Ellis for the mutual benefit of the parties hereto * * *" (Tr. 115).

Certainly "*delivery*" of Exhibit 4 signed by petitioner was necessarily contemplated by plaintiff in making his written offer. Nowhere in plaintiff's written offer (Exhibit 4), is there any reference to a separate letter to be written by petitioner as an acceptance of the offer.

With respect to (b), the second of the above reasons, we point out that even if it should be deemed that a separate letter by petitioner or its attorneys was a proper substitute for the acceptance contemplated by plaintiff's offer, nevertheless the mailing of such separate letter *to plaintiff* was not a delivery thereof in the manner or at the place contemplated by plaintiff's offer, for it was not a delivery of the acceptance to Hall & Ellis, as escrowee. Even if we are wrong in our contention, however, that the place of delivery is so restricted to Hall & Ellis, as escrowee, nevertheless the *mailing* as distinguished from the *receipt* of the

separate letter could not constitute an effective acceptance, for the third reason (c) above noted. Plaintiff's offer was submitted by plaintiff to petitioner's own attorneys in person. Under the above authorities, therefore, receipt, as distinguished from mailing of the letter, would constitute the effective date of the acceptance and petitioner, through its attorneys, admittedly, notified plaintiff before the receipt by plaintiff of the letter, that defendant had refused to accept the offer. Plaintiff in his testimony admitted that in his telephone conversation with Britton on May 28th, Britton stated to him:

> "I am sorry to tell you that I received instructions from the New England Mutual Life Insurance Company not to do anything further in your deal,"

and that Britton further told him

> "that the paper which he had sent—yes, he told me he had sent—that he was going to send to Hall & Ellis by messenger was still in the Messenger Boy's box and that he was able to stop that from going to Hall & Ellis" (Tr. 124).

Certainly it cannot be contended that the previous telephone conversation which plaintiff had with attorneys on that day could constitute an acceptance of plaintiff's offer. Plaintiff's offer clearly contemplated a written acceptance thereof. Nowhere in the pleadings, the record in this case, or the decree itself, is there any suggestion that the contract which plaintiff is seeking to specifically enforce is the result of any verbal acceptance by petitioner of plaintiff's offer. Nowhere in this case is there any suggestion of any estoppel as the basis for the establishment of any contract. Manifestly, if plaintiff's offer contemplated a written acceptance, as is clear in the case at bar, such ac-

eptance could only have become effective under the very rms of the offer by the signing and relinquishment of ossession and control of Exhibit 4 by petitioner. We ubmit that under the undisputed facts, petitioner never ccepted plaintiff's written offer.

In conclusion, we respectfully submit that a writ of cerorari to the Circuit Court of Appeals for the Seventh ircuit should be granted.

J. Robert Cohler,
Counsel for Petitioner.